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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY MCNABB, III,

Defendant and Appellant.

B237604

(Los Angeles County
Super. Ct. No. GA082578)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dorothy L. Shubin, Judge. Affirmed.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Jimmy McNabb, III, appeals from the judgment entered following a jury trial which resulted in his conviction of second degree commercial burglary (Pen. Code, § 459)¹ and petty theft (§ 484, subd. (a)) and his admission that he previously had been convicted of the serious and violent felony of robbery (§ 211) within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced McNabb to 32 months in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

Fidel Cervantes, Jr. is a full-time student and has a part-time job at the Kohl's Department Store in Monrovia as a loss prevention officer. When he first became an officer approximately two years ago, he underwent computer-based training and drove to various stores in order to work with different officers throughout the district. His job was "pretty much just [to] prevent any shortage for the store."

At approximately 9:00 p.m. on February 19, 2011, Cervantes, who was working by himself that evening, was watching the sales floor by monitoring the closed circuit camera system in the office. He was watching the camera system because it allowed him to "maintain observation o[f] the whole floor." There are approximately 50 cameras covering every angle on the sales floor. In addition, they are always recording. If one wishes to go back to an earlier time in the day, they can simply copy the recordings from the cameras to a disc.

As Cervantes was watching the cameras, he saw McNabb in the "young men's department" of the store. McNabb randomly selected two shirts, then walked to the shoe department. There, he approached a young woman, Angelica Carter, who appeared to be with him. While in the shoe department with Carter, McNabb "conceal[ed]" the two shirts he had been carrying in his hand. By watching the camera, Cervantes could see McNabb place the shirts underneath his sweater, in his armpit area. McNabb then continued to "browse [through the] merchandise."

¹ All further statutory references are to the Penal Code unless otherwise indicated.

As McNabb and Carter continued to look around the store, they were joined by another young woman, Amen Okon. They went to the “junior’s,” or young women’s department, where Okon took a gray shirt and two white “tops” and placed them in her purse. While McNabb and Okon continued to browse, Carter went to the jewelry department. She selected a few items and removed the tags. Okon and Carter then went to the fragrance department, where Okon concealed some perfume in her “sweater area [by her] chest area.” At this point, McNabb was “off . . . on his own” “in the front right by the exit [near] the clothes department.” McNabb left the store and, approximately five minutes later, Carter and Okon followed.

As McNabb began to leave the store, Cervantes contacted the Monrovia Police Department. He came out of the office and, as Carter and Okon left the store, he followed them. The entire time he was on the phone on “standby” with a police officer. As McNabb, Carter and Okon begin to walk south, toward a Marshall’s store, police officers arrived and detained them. The officers retrieved 12 stolen items, including jewelry and fragrances from Carter and “graphic shirts” from Okon. In total, Carter took approximately \$329 worth of merchandise and Okon took approximately \$379 worth of items.² With regard to McNabb, Cervantes saw a blue shirt and a green shirt on the sidewalk approximately 12 inches from McNabb’s left foot. The tags were still on the shirts, showing that they were worth \$18 each.

That evening, approximately nine or ten minutes after McNabb had entered the men’s department, Cervantes had begun to write down his observations. Cervantes later prepared a report on the incident and submitted it to the district manager in charge of loss prevention. Cervantes also prepared a video of the incident. Later, the two shirts which had been taken by McNabb were brought back to Cervantes’s office. The shirts still had their tags but they did not have “security device[s]” on them.

² Later, Cervantes testified that Carter took \$379 and Okon took \$329 worth of items.

Agent Luis Villalobos works for the City of Monrovia Police Department. He is a supervisor and a field training officer and has been with the department for approximately 14 years. He was one of the officers called to the Kohl's Department store on the night of February 19, 2011. The call was regarding a "theft . . . in progress at the store" and involved three suspects, two females and a male.

Villalobos and his partner, Officer Steven Ramos, were in full uniform and driving a marked car when they arrived at the store parking lot. They parked their car west of the entrance along a row of parked cars and "tried to conceal [them]selves and put [them]selves in a position so [they] could watch the front doors." Other officers had also responded to the call and Villalobos "directed them to park along different sites . . . so they could contain the area in case [one of the suspects] ran from [them]."

Approximately five minutes after Villalobos and Ramos had parked their car, McNabb came out of the store. He stood in front of the store for a time, then two women came out and joined him. As the three individuals walked south on the sidewalk, Villalobos "directed everybody to move in to detain them." Several officers arrived simultaneously and took McNabb, Carter and Okon into custody.

Villalobos focused on McNabb. He could "see there was a green material fabric underneath his left armpit area, and it looked like it could be a shirt" As he was attempting to walk away, McNabb "brought his hand up and started to lower it against the side of his body[.]" Although he tried not to let the officer see, Villalobos saw McNabb drop something. When Villalobos went back to retrieve the item, he realized that McNabb had been carrying two T-shirts under his arm.

Officer Ramos approached Okon. He "retrieve[d]" her purse, then searched it. Inside, the officer found a five- to six-inch box cutter and merchandise from Kohl's, including some graphic T-shirts, jewelry, shoes and sunglasses.

Although another officer searched Carter's purse, the officer gave to Ramos some of the items he found so that they could be returned to Kohl's. The officer gave to Ramos some women's clothing, a Burberry fragrance and two pair of shoes.

After the officers had detained McNabb, Carter and Okon, they searched an older model Lexus parked in the Kohl's lot. They obtained the keys from Okon, who owed the car. Inside were several items which still had the price tags on them from a store called Ross. There was a metal pot, a man's athletic jersey and other sports clothing, a pair of leather boots, women's clothing and some playing cards. There were no receipts or bags from the Ross store.

Christine Garland was the jailer at the Monrovia Police Department on the night of February 19, 2011. As jailer, Garland took inventory of the personal possessions belonging to an individual being taken into custody, typed a list into the department's computer, then placed the items into a locker. The detainee would review the list, sign a form indicating that it was accurate and receive a receipt. The property booked by Garland is considered to be the suspect's, is not considered to be evidence and is returned to the suspect when he or she leaves the facility.

At 1:16 a.m. on February 20, 2011, Garland booked McNabb into custody. He reviewed the list of items, then signed the form. Garland had booked for McNabb tennis shoes, a beanie hat, a cell phone, a key ring, a jacket, a rubber band for his hair, a watch and some shorts. McNabb was not carrying a wallet, any cash or any credit cards.

2. Procedural history.

Following a preliminary hearing, on June 16, 2011 McNabb was charged by information with one count of second degree commercial burglary, a felony (§ 459) (count 1), and petty theft, a misdemeanor (§ 484, subd. (a)). It was further alleged with regard to count 1 that McNabb had previously been convicted of the serious or violent felony or juvenile adjudication of robbery (§ 211) within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On July 1, 2011, counsel for McNabb made a motion to dismiss the case against him pursuant to section 995. Counsel argued that the magistrate had based his order holding McNabb to answer on the fact that he was with the two women. If he had been alone, there would have been insufficient evidence to detain him. The trial court disagreed and held McNabb to answer.

On July 19, 2011, counsel for McNabb filed a motion to dismiss McNabb's prior conviction alleged pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Counsel argued the prior should be stricken in furtherance of justice (§ 1385; see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) because "in light of the nature and circumstances of his present felon[y] and prior serious and/or violent felony . . . , and the particulars of his background, character, and prospects, [McNabb should] be deemed outside the scheme's spirit" (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Counsel asserted McNabb's prior conviction was 10 years old and his present offenses were neither serious nor remotely violent. He simply made a "mistake in judgment" and followed a "misguided sense of survival." After the prosecutor argued that McNabb had a lengthy criminal record, which began when he was a juvenile and included such crimes as armed robbery, making terrorist threats and grand theft, the trial court again disagreed with McNabb's counsel and denied the motion.

Trial was by jury. After the prosecution presented its case, McNabb indicated he did not wish to testify. The trial court advised McNabb of his "absolute constitutional right not to testify" or "to testify," and when McNabb stated that he was choosing not to, the court "accept[ed] the waiver of the right to testify [and found] it to [have been] freely and voluntarily given."

After the evidence on the substantive offenses had been presented, the trial court advised McNabb that, if the jury were to find him guilty of count 1, he had the right to have the jury determine beyond a reasonable doubt whether he had committed the alleged strike. In the alternative, he could have the court decide or he could admit the prior. McNabb's counsel indicated that if McNabb were to be "convicted of count 1, [he and McNabb were] discussing an admission of [the] prior."

The jury began deliberating on Wednesday, August 17, 2011. That afternoon, the foreperson sent to the trial court two notes. The first note read: " 'We the jury in the above entitled action request the following court report of Cervantes's testimony on Tuesday.' " The second note indicated: " 'We the jury in the above entitled action request the following under count No. 1, No. 2, is there a difference between whether he

had intent to directly commit theft or had knowledge that a theft was going to be committed?’ ”

After consulting with counsel, the trial court stated that, since it was nearly 4:00 p.m., the answer to the first note would read: “ ‘The reporter will be prepared to do the readback tomorrow morning.’ ” With regard to the second inquiry, both counsel requested that the court refer the jury to instructions Nos. 1700 and 1800.³

On the afternoon of August 18, 2011, the jury “buzzed,” indicating they had reached verdicts. With regard to count 1, “ ‘the jury in the above entitled action [found] the defendant Jimmy McNabb guilty of the crime of second degree commercial burglary in violation of . . . section 459, a felony’ ” When the clerk polled the jury, each juror indicated that that was his or her true and correct verdict. As to count 2 “ ‘in the same case, title, and cause,’ ” the jury found “ ‘the defendant Jimmy McNabb guilty of the crime of petty theft in violation of . . . section 484, subsection (a), a misdemeanor’ ” The court clerk again polled the jury and each juror indicated that “this [was its] true and correct verdict[.]”

After the jurors were dismissed, McNabb decided that he would admit the prior Three Strikes conviction. Sentencing would then be put over until September 22, 2011.

The trial court addressed McNabb and informed him that he had “a prior conviction of . . . section 211, case number SA042023, [which had occurred on] May 15th, 2001 [in] Los Angeles County Superior Court.” It had been alleged with

³ CALCRIM No. 1700 provides: “The defendant is charged in Count 1 with second degree commercial burglary in violation of . . . section 459. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant entered a building; [¶] AND [¶] 2. When he entered a building, he intended to commit theft. [¶] To decide whether the defendant intended to commit theft, please refer to the separate instruction that I will give you on the crime of petty theft. . . .”

CALCRIM No. 1800 states: “The defendant is charged in Count 2 with petty theft in violation of . . . section 484. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner’s or owner’s agent’s consent; [¶] 3. When the defendant took the property he intended to deprive the owner of it permanently”

regard to count 1 that the prior occurred pursuant to section 667, subdivisions (b) to (i) and 1170.12, subdivisions (a) to (d), the Three Strikes law. “In other words, it ha[d] the effect of doubling [McNabb’s] sentence” The trial court then indicated that McNabb had the right to a court trial on the prior. The court explained: “You would have all the rights that you had in connection with your trial except it would be before the court: the right to deny the charges against you, the right to present a defense, the right to subpoena witnesses to [the] court free of charge, the right to confront and cross-examine witnesses, and the right to testify or [the] right to remain silent.”

After McNabb indicated that he understood and waived his right to a trial, he admitted having suffered the Three Strikes conviction. The trial court determined the admission had been “freely and voluntarily given [following] a knowing and intelligent waiver of the defendant’s rights.” The court found the prior to be true.

On November 18, 2011, counsel for McNabb renewed his *Romero*⁴ motion which raised facts which he had not known, and thus had not mentioned, in the initial motion. A hearing was held at which McNabb’s father, Jimmy McNabb, Jr., testified that his 28-year-old son had an I.Q. of only 69 and a “cognitive disability.” McNabb, Jr. had become aware of this disability when McNabb was in the fifth or sixth grade and began to have “behavioral” problems. McNabb, Jr., a mental health professional, was in “denial” when he received a report indicating there was “something wrong with” his son and he took no action to remedy the situation. McNabb, Jr., stated that, although mild mental retardation may have nothing to do with criminal propensity, “[i]t could have something to do with [the individual’s] judgment, . . . their decision-making [and] their cognitive skills. . . . [¶] Sometimes around the age of . . . nine or ten is when you find that their skills academically and their cognitive skills are not keeping up with the other kids their age. And as they grow older, they’re still not capable of making . . . decisions that, quote, unquote, [a] normal person [would] make.”

⁴ *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.

McNabb, Jr. told the court that all of McNabb's "mistakes and the reason he's sitting there, all the crimes and everything that he did, all of his faults [could] be directly traced back to [his] failures and his mother's failures as parents." "[H]e's been needing help all of his life The help that [McNabb, Jr.] did not provide for him."

In commenting on McNabb, Jr.'s testimony, defense counsel asserted that, "[t]o put it quite simply and bluntly, while this does not absolve Mr. McNabb of the crime and while it does not absolve Mr. McNabb of consideration for sentencing under *Romero*, . . . the court need[ed] to consider as a strong [factor in] mitigation the fact that, while he was at the age of minority, [McNabb] was not given any real treatment or guidance or assistance from his family." Counsel, however, acknowledged that the robbery had been "an aggravated act" (there had been two victims and a firearm was used).

Counsel had not seen anything else in McNabb's history which suggested that he was the type of hard-core recidivist that demanded sentencing under *Romero* for a crime of this level. "With regard[] to the facts surrounding the crime leading to the current conviction, . . . [counsel believed] the testimony of the witness[]" provided some clarity. It underscored that his conduct was, in and of itself, somewhat minimal. "It was a shoplift of two T-shirts." With that in mind, counsel urged the trial court to "strike the use of the prior and to sentence [McNabb] accordingly."

The trial court indicated that, although it had listened carefully to McNabb, Jr.'s testimony, it was nevertheless going to deny counsel's motion. The court indicated: "First, as the court has stated in the initial denial, the 211 that constitutes Mr. McNabb's prior strike was extremely violent. And although that offense is about ten years old, Mr. McNabb was in custody for most of that time, and upon release, while he was still on parole, he committed the new offense. [¶] Prior to the 211 he had two theft-related sustained petitions, one for [section] 10851[, subdivision] (a) and one for . . . section 459. So he has a history of theft-related offenses. [¶] In terms of the testimony that the court heard today, even if Mr. McNabb suffers from some sort of reduced capacity, [it is] not to the point where he can't comprehend his actions[.] . . . [E]ven if he doesn't have as high [a] capacity as others, there's no evidence that he cannot understand the nature and

wrongness of his crime.” “Many people who come from a broken home or a home that doesn’t offer what it should rise above those circumstances and . . . don’t embark upon a series of crimes that harms others. Therefore, the court respectfully denies the *Romero* motion.”

The trial court ordered probation denied “for the reasons stated.” With regard to count 1, the court imposed the low term of 16 months in state prison, then doubled the term to 32 months pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). For count 2, the trial court imposed six months, then stayed the term pursuant to section 654.⁵ The trial court indicated it had selected the low term because the “offense was relatively minor[;] . . . it was not a violent offense [and] . . . McNabb’s role was somewhat limited” McNabb was awarded presentence custody credit for 273 days actually served and 136 days of conduct credit, for a total of 409 days. He was ordered to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a suspended \$200 parole revocation restitution fine (§ 1202.45), a \$40 court security fee (§ 1465.8, subd. (a)) and a \$30 criminal conviction fee (Gov. Code, § 70373).⁶

McNabb filed a timely notice of appeal and request for appointed counsel on November 18, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed August 13, 2012, the clerk of this court advised McNabb to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

⁵ Section 654 provides: “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .”

⁶ On the abstract of judgment, it is indicated that the trial court imposed a \$60 criminal conviction fee and an \$80 court security fee.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel had complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P.J.

CROSKEY, J.